Nos. 17-765 and 17-766

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

VICTOR J. STITT, II,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

v.

JASON DANIEL SIMS,
Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Sixth and Eighth Circuits

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JEFFREY T. GREEN
Co-Chair, AMICUS CURIAE COMMITTEE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

DAVID DEBOLD
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

AKIVA SHAPIRO
SARAH L. KUSHNER
GENEVIEVE QUINN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, N.Y. 10166
(212) 351-4000

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether a state burglary statute that permits conviction for burglary of a temporary space or a vehicle that is adapted or used for occasional overnight accommodation exceeds the generic crime of "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 5

I. WHEN THE ACCA WAS ENACTED IN 1984 AND AMENDED IN 1986, THE MAJORITY OF STATES' BURGLARY STATUTES DISTINGUISHED BETWEEN STRUCTURES AND BOTH TEMPORARY SPACES AND MOBILE VEHICLES. 5

II. THE GOVERNMENT'S POSITION THAT THERE WAS A "BROAD CONSENSUS" IN 1986 THAT BURGLARY COVERED TEMPORARY SPACES OR MOBILE VEHICLES ADAPTED OR USED FOR OVERNIGHT ACCOMMODATION IGNORES FUNDAMENTAL DIFFERENCES AMONG THE 1986 STATE STATUTES. 11

III. THE ADDITION OF TEMPORARY SPACES AND MOBILE VEHICLES ADAPTED FOR OVERNIGHT ACCOMMODATION TO THE GENERIC DEFINITION OF BURGLARY FAILS TO CLOSE THE PURPORTED "GAP" BETWEEN THE ACCA AND STATE-LAW DEFINITIONS OF BURGLARY, AS NUMEROUS STATE BURGLARY STATUTES WOULD REMAIN OVERBROAD. 15

IV. THE ACCA IS PROPERLY FOCUSED ON FORM, RATHER THAN FUNCTION, IN DELINEATING THOSE PLACES ENCOMPASSED BY GENERIC BURGLARY. 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Bifulco v. United States,
447 U.S. 381 (1980) 23

Blankenship v. State,
780 S.W.2d 198
(Tex. Crim. App. 1988) 13

Commonwealth v. Graham,
9 A.3d 196 (Pa. 2010) 13

Descamps v. United States,
570 U.S. 254 (2013) 1, 11, 16

Garcia v. United States,
469 U.S. 70 (1984) 8

James v. United States,
550 U.S. 192 (2007) 23

Johnson v. United States,
135 S. Ct. 2251 (2015) 22, 23

Mathis v. United States,
136 S. Ct. 2243 (2016) 1, 2, 16, 20, 21

Nat'l Ass'n of Mfrs. v. Dep't of Def.,
138 S. Ct. 617 (2018) 10

Nijhawan v. Holder,
557 U.S. 29 (2009) 11

Shepard v. United States,
544 U.S. 13 (2005) 1, 10

Taylor v. United States,
495 U.S. 575 (1990) ..... *passim*

United States v. Bass,
404 U.S. 336 (1971) 22, 24

United States v. Concha,
233 F.3d 1249 (10th Cir. 2000) 23

United States v. Grisel,
488 F.3d 844 (9th Cir. 2007) 22

United States v. R.L.C.,
503 U.S. 291 (1992) 23

United States v. Rainer,
616 F.3d 1212 (11th Cir. 2010) 21

Statutes

18 U.S.C. § 924(e)(1) (2018) 2

18 U.S.C. § 924(e)(2)(B)(ii) (2018) 2

18 U.S.C. § 1202(c)(9) (1984) 3

Ala. Code § 13A-7-1 (1983) 13, 14

Ala. Code. § 13A-7-5 (1979) 13

Alaska Stat. § 11.46.300 (1978) 13

Alaska Stat. Ann. § 11.46.310 (2018) 17

Alaska Stat. § 11.81.900 (1984) 8, 13, 14

Alaska Stat. Ann. § 11.81.900 (2018) 17

Ariz. Rev. Stat. § 13-1501 (1978) 7

Ark. Stat. § 5-39-101 (1975) 12, 14

Ark. Stat. § 5-39-201 (1975) 12

Ark. Stat. § 5-39-202 (1975) 7

Cal. Penal Code § 459 (1984) 6

Cal. Penal Code Ann. § 459 (2018) 18

Cal. Penal Code Ann. § 460 (2018) 18

Colo. Rev. Stat. § 18-4-101 (2018) 17

Colo. Rev. Stat. § 18-4-202 (2018) 17

Colo. Rev. Stat. § 18-4-203 (2018) 17

Conn. Gen. Stat. Ann. § 53a-100 (1979) 8

Conn. Gen. Stat. Ann. § 53a-101 (1981) 8

Conn. Gen. Stat. Ann. § 53a-102 (1971) 8

Conn. Gen. Stat. Ann. § 53a-102a (1976) 8

Conn. Gen. Stat. Ann. § 53a-103 (1971) 8

Conn. Gen. Stat. Ann. § 53a-103a (1975) 8

D.C. Code § 22-1801 (1973) 6

D.C. Code Ann. § 22-801 (2018) 17

Del. Code tit. 11 § 222 (1973) 9

Fla. Stat. Ann. § 810.011 (1982) 7

Ga. Code Ann. § 16-7-1 (1980) 7, 14

Haw. Rev. Stat. Ann. § 708-800 (1979) 15

Idaho Code § 18-1401 (1981) 6

Idaho Code Ann. § 18-1401 (2018) 18

Ill. Stat. Ann. ch. 38, ¶ 19-1 (1982) 7

Iowa Code Ann. § 702.12 (1984) 7, 21

Iowa Code Ann. § 702.12 (2018) 17

Iowa Code Ann. § 713.1 (1984) 7

Iowa Code Ann. § 713.1 (2018) 17

Iowa Code Ann. § 713.3 (2018) 17

Iowa Code Ann. § 713.5 (2018) 17

Iowa Code Ann. § 713.6A (2017) 17

Kan. Stat. Ann. § 21-3715 (1969) 7

Ky. Rev. Stat. § 511.010 (1980) 9

Ky. Rev. Stat. Ann. § 511.010 (2018) 18

Ky. Rev. Stat. Ann. § 511.020 (2018) 18

Ky. Rev. Stat. Ann. § 511.040 (2018) 18

Mass. Gen. Laws Ann. ch. 266 § 16 (1974) 7

Mass. Gen. Laws Ann. ch. 266 § 16A (1966) 7

Me. Stat. Ann. tit. 17-A § 2 (1983) 7

Me. Stat. Ann. tit. 17-A § 401 (1985) 7

Mich. Comp. Laws § 750.110 (1968) 7

Mich. Comp. Laws Ann. § 750.110 (2018) 19

Minn. Stat. § 609.581 (1983) 14

Miss. Code Ann. § 97-17-33 (1960) 7

Mo. Ann. Stat. § 569.010 (1979) 7

Mo. Ann. Stat. § 569.010 (2018) 18

Mo. Ann. Stat. § 569.160 (1979) 7

Mo. Ann. Stat. § 569.160 (2018) 18

Mo. Ann. Stat. § 569.170 (1979) 7

Mo. Ann. Stat. § 569.170 (2018) 18

Mont. Code Ann. § 45-2-101 (1981) 7

Mont. Code Ann. § 45-2-101 (2017) 18

Mont. Code Ann. § 45-6-204 (1981) 7

Mont. Code Ann. § 45-6-204 (2017) 18

Nev. Rev. Stat. § 205.060 (1983) 7

Nev. Rev. Stat. Ann. § 205.060 (2017) 19

N.H. Rev. Stat. Ann. § 635:1 (1973) 7

N.H. Rev. Stat. Ann. § 635:1 (2018) 18

N.J. Stat. Ann. § 2C:18-1 (1980) 7

N.J. Stat. Ann. § 2C:18-1 (2018) 19

N.J. Stat. Ann. § 2C:18-2 (2018) 19

N.Y. Penal Law § 140.00 (1979) 9, 12

N.C. Stat. Ann. § 14-54 (1981) 6

N.C. Stat. Ann. § 14-56 (1979) 6

N.D. Cent. Code Ann. § 12.1-05-12 (1973) 7, 15

N.D. Cent. Code Ann. § 12.1-22-02 (1973) 7

N.D. Cent. Code Ann. § 12.1-22-06 (1973) 7

N.D. Cent. Code Ann. § 12.1-22-02 (2017) 18

N.D. Cent. Code Ann. § 12.1-22-06 (2017) 18

Ohio Rev. Code Ann. § 2911.11 (1983) 7

Ohio Rev. Code Ann. § 2911.12 (1982) 7

Ohio Rev. Code Ann. § 2909.01 (1974) 7

Or. Rev. Stat. Ann. § 164.205 (2018) 18

Or. Rev. Stat. Ann. § 164.215 (2018) 18

Pa. Cons. Stat. Ann. § 3501 (1973) 7

Pa. Cons. Stat. Ann. § 3502 (1973) 7

S.C. Code Ann. § 16-11-10 (1962) 13

S.C. Code Ann. § 16-11-311 (1985) 13

S.C. Code Ann. § 16-11-312 (1985) 13

S.D. Codified Laws § 22-1-2 (1976) 8

S.D. Codified Laws § 22-1-2 (2018) 19

S.D. Codified Laws § 22-32-1 (1976) 7, 8

S.D. Codified Laws § 22-32-1 (2018) 19

S.D. Codified Laws § 22-32-3 (2018) 19

S.D. Codified Laws § 22-32-8 (2018) 19

Tenn. Code Ann. § 39-3-401 (1973) 5

Tenn. Code Ann. § 39-3-403 (1982) 5

Tenn. Code Ann. § 39-3-406 (1950) 5

Tex. Penal Code Ann. § 30.01 (1974) 8, 20

Tex. Penal Code Ann. § 30.02 (1974) 8, 20

Tex. Penal Code Ann. § 30.04 (1974) 8, 20

Utah Code Ann. § 76-6-201 (1973) 9

Utah Code Ann. § 76-6-201 (2018) 18

Utah Code Ann. § 76-6-202 (2018) 18

Utah Code Ann. § 76-6-203 (2018) 18

Va. Code Ann. § 18.2-90 (1975) 13, 14

W. Va. Code § 61-3-11 (1973) 13

W. Va. Code § 61-3-12 (1923) 8

Wisc. Stat. Ann. § 943.10 (1978) 5

Wyo. Stat. Ann. § 6-3-301 (2018) 19

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL"), founded in 1958, is a nonprofit voluntary professional bar association comprised of private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL often files *amicus* briefs in this Court in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. It has participated as an *amicus* in many of this Court's decisions involving the Armed Career Criminal Act of 1984, including *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *Descamps v. United States*, 570 U.S. 254 (2013); and *Mathis v. United States*, 136 S. Ct. 2243 (2016).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Armed Career Criminal Act of 1984 ("ACCA") imposes a 15-year mandatory minimum sentence for certain federal criminal defendants who have three

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

prior convictions for a "violent felony," as defined under the ACCA, including "burglary." 18 U.S.C. §§ 924(e)(1), (e)(2)(B)(ii) (2018).

In *Taylor v. United States*, this Court held that ACCA burglary refers to the generic crime of burglary, which the Court defined as "an unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime." 495 U.S. 575, 598 (1990). The Court provided this definition to fill a gap created by Congress when, in the course of amending the ACCA in 1986, it removed—apparently inadvertently—the definition of burglary included in the 1984 version of the act. As relevant here, *Taylor* and its progeny make clear that a state burglary statute is "broader than generic burglary"—and thus cannot give rise to a predicate offense of ACCA burglary—if it reaches "places" beyond "a building or other structure." *Mathis v. United States*, 136 S. Ct. 2243, 2248, 2250 (2016). Thus, in *Mathis*, the Court distinguished between "buildings and other structures" on the one hand, and "vehicles" on the other hand, and held that while the former "satisfy the generic definition" of burglary, the latter do not. *Id.* at 2250.

The main issue in these cases is whether vehicles used for occasional overnight accommodation, such as the sleeping cab of an 18-wheeler or fishing boat, qualify as a "building or other structure" under the generic definition of burglary. They do not. The Court in *Taylor* made clear that "there is nothing in the history [of the ACCA] to show that Congress intended in 1986 to replace the 1984 'generic' definition of burglary"—which was expressly limited to "buildings"—with something entirely different. 495 U.S. at 590; *see also*

18 U.S.C. § 1202(c)(9) (1984). A building is, quite obviously, a permanent, immovable structure very much unlike an 18-wheeler. This Court's reference to "other structure[s]" in *Taylor* was not intended to expand the generic crime of burglary to mobile living spaces. Rather, it must be understood to refer to edifices that, while not traditional buildings, are similar in kind to buildings, *i.e.*, permanent and immovable.

The government seeks to shoehorn into *Taylor*'s reference to "other structure[s]" what it calls "nonpermanent or mobile dwellings" that are "adapted or used for overnight accommodation." U.S. Br. 16–27. The government's proposed definition of ACCA burglary would undermine *Taylor* and its progeny and obliterate the sharp distinctions this Court has repeatedly drawn between generic burglary and broader crimes defined in certain state burglary statutes.

The government argues that its proposed definition is supported by the state statutes in place in 1986, when Congress amended the ACCA. But neither those statutes nor the state burglary statutes in place in 1984, when the ACCA was initially enacted, reflect a broad consensus—or any consensus at all—among the states that the generic definition of burglary encompassed temporary spaces and vehicles with overnight accommodations, let alone those specifically used for sleeping. As this Court observed in *Taylor*, "the word 'burglary' has not been given a single accepted meaning by the state courts; the criminal codes of the States define burglary in many different ways." 495 U.S. at 580. To the extent there was any consensus among states regarding the generic definition of burglary in 1984 or 1986, nothing supports the gov-

ernment's assertion that most states understood generic burglary to include mobile vehicles used for overnight accommodation.

The government's definition also does not close the alleged "untenable statutory gap" between ACCA burglary and the crime of burglary defined in relevant state statutes. U.S. Br. 26. Many of these state statutes extend to conduct beyond the government's proposed definition because they cover entry of temporary spaces or mobile vehicles either (i) irrespective of the purpose of the space or vehicle, or (ii) for specified purposes that extend beyond overnight accommodation. Thus, even under the government's expanded definition, numerous state burglary offenses would fail to qualify as ACCA sentencing predicates. The government's "solution" thus does not solve its purported "gap" problem.

Finally, this Court has correctly looked to objective form, rather than subjective use, in determining whether certain spaces are encompassed by the ACCA's generic definition of "burglary." This bright-line rule affords consistency in applying the ACCA and makes practical sense. The government's expanded definition of "generic burglary"—which hinges on a space's actual or intended use—would engender confusion and result in inconsistent application of the ACCA. It would also run afoul of the rule of lenity.

For all these reasons, the Court should hold that a state statute permitting conviction for unlawful entry of a temporary space or vehicle used for occasional overnight accommodation is broader than the definition of generic burglary under the ACCA.

ARGUMENT

I. When the ACCA Was Enacted in 1984 and Amended in 1986, the Majority of States' Burglary Statutes Distinguished Between Structures and Both Temporary Spaces and Mobile Vehicles.

As the government notes, "*Taylor*'s definition of burglary was meant to reflect the 'generic sense' in which 'most States' defined the term" at the time of the ACCA's passage. U.S. Br. 33 (quoting 495 U.S. at 598). The government bases its new definition on the premise that there was a "broad consensus in 1986 that burglary included nonpermanent or mobile structures adapted or used for overnight accommodation." *Id.* at 19. That premise is false.

1. When Congress enacted the ACCA in 1984 and amended it in 1986, the majority of states' burglary statutes distinguished, in one way or another, between structures, such as buildings, on the one hand, and temporary spaces or mobile vehicles—even if habitable—such as RVs, boats, or railroad cars, on the other hand. That distinction between structures and vehicles existed regardless of whether the latter were purposed or used for overnight accommodation. For example, Wisconsin's burglary statutes distinguished between burglary of "[a]ny building or dwelling," on the one hand, and burglary of a "motor home or other motorized type of home or a trailer home." Wisc. Stat. Ann. § 943.10 (1978); *see also, e.g.*, Tenn. Code Ann. §§ 39-3-401 (1973), 39-3-403 (1982), 39-3-406 (1950) (different burglary statutes for "dwelling house, or any other house, building, room or rooms therein" and "any freight or passenger car, automobile, truck,

trailer or other motor vehicle").[2] Similarly, North Carolina had separate burglary statutes entitled "breaking or entering buildings generally" and "breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft." N.C. Stat. Ann. §§ 14-54 (1981), 14-56 (1979).[3]

In other states, burglary statutes delineated the types of fixed, stationary objects that would constitute—or be deemed similar to—buildings, as distinct from non-permanent spaces, mobile vehicles, or other objects. *See, e.g.*, Idaho Code § 18-1401 (1981) ("Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, *or other building*, tent, vessel, closed vehicle, closed trailer, airplane or railroad car, with intent to commit any theft or any felony, is guilty of burglary." (emphasis added)).[4] Similarly, numerous states had

---

[2] Citations to historical versions of state statutes (Pts. I, II & IV) refer to the effective dates of those statutes. Unless otherwise noted, the language of such statutes remained unchanged between the effective dates and 1986. Citations to present-day state statutes (Pt. III) are to the current annotated codes.

[3] The government's chart of state burglary statutes in effect at the time of the 1986 amendments to the ACCA does not include certain burglary-related statutes in effect at that time that are relevant to the analysis, including North Carolina's statute criminalizing breaking or entering vehicles. *See* U.S. Br. App'x B at 33a.

[4] *See also, e.g.*, Cal. Penal Code § 459 (1984) (defining burglary to include "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse *or other building*, tent, vessel, railroad car, . . . trailer coach, . . . house car, . . . inhabited camper, . . . aircraft . . ." (emphasis added)); D.C. Code § 22-1801(b) (1973) (defining burglary to include "any dwelling, bank,

burglary statutes and definitions that listed the term "building" as part of a disjunctive list which included non-permanent and mobile objects, such as "mobile home," "vehicle" or "aircraft." *See* Ill. Stat. Ann. ch. 38, ¶ 19-1 (1982) (defining burglary to include "a building, housetrailer, watercraft, aircraft, motor vehicle[,] . . . railroad car, *or* any part thereof" (emphasis added)).[5] By doing so, these states demonstrated a

---

store, warehouse, shop, stable, *or other* building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car" (emphasis added)); Mich. Comp. Laws § 750.110 (1968) (defining burglary, under the title "breaking and entering," to include "any tent, hotel, office, store, shop, warehouse, barn, granary, factory *or other building*, structure, boat or ship, railroad car or any private apartment in any of such buildings or any . . . dwelling house" (emphasis added)); Miss. Code Ann. § 97-17-33 (1960) (burglary of non-dwelling building statute applies to "any shop, store, booth, tent, warehouse, *or other building* or private room or office therein, ship, steamboat, flatboat, railroad car, automobile, truck or trailer in which any goods, merchandise, or valuable thing shall be kept for use, sale, deposit, or transportation" (emphasis added)); Nev. Rev. Stat. § 205.060 (1983) (burglary statute applies to "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse *or other building*, tent, vessel, vehicle, vehicle trailer, semitrailer or housetrailer, airplane, glider, boat or railroad car" (emphasis added)).

[5] *See also, e.g.*, Ariz. Rev. Stat. § 13-1501 (1978); Ark. Stat. § 5-39-202 (1975); Fla. Stat. Ann. § 810.011(2) (1982); Ga. Code Ann. § 16-7-1 (1980); Iowa Code Ann. §§ 713.1, 702.12 (1984); Kan. Stat. Ann. § 21-3715 (1969); Me. Stat. Ann. tit. 17-A §§ 401 (1985), 2 (1983); Mass. Gen. Laws Ann. ch. 266 §§ 16 (1974), 16A (1966); Mo. Ann. Stat. §§ 569.010, 569.160, 569.170 (1979); Mont. Code Ann. §§ 45-6-204, 45-2-101(40) (1981); N.H. Rev. Stat. Ann. § 635:1 (1973); N.J. Stat. Ann. § 2C:18-1 (1980); N.D. Cent. Code Ann. §§ 12.1-22-02, 12.1-22-06, 12.1-05-12 (1973); Ohio Rev. Code Ann. §§ 2911.11 (1983), 2911.12 (1982), 2909.01 (1974); Pa. Cons. Stat. Ann. §§ 3501, 3502 (1973); S.D. Codified Laws §§ 22-

clear "intent to give the nouns their *separate*, normal meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984) (emphasis added).

Of the minority of states that turned "building" into a defined term that reached non-permanent objects, or mobile vehicles, adapted for a specific purpose or purposes, most made clear that, by doing so, they were expanding the term building beyond its "ordinary meaning." For example, Connecticut's burglary statutes at the time covered entering or unlawfully remaining in, *inter alia*, a "building," which Connecticut's legislature defined to include, "*in addition to its ordinary meaning* . . . any watercraft, aircraft, trailer, sleeping car, railroad car, other structure or vehicle or any building with a valid certificate of occupancy." Conn. Gen. Stat. Ann. § 53a-100 (1979) (emphasis added); *see also id.* §§ 53a-101 (1981), 53a-102 (1971), 53a-102a (1976), 53a-103 (1971), 53a-103a (1975). The state legislatures of Alaska, Delaware, Kentucky, New York, Oregon, and Utah were likewise explicit about their decision to expand the term "building," as used in their respective states' burglary statutes in effect at the time, beyond the "ordinary" or "usual" meaning of that word.[6]

32-1, 22-1-2 (1976); W. Va. Code § 61-3-12 (1923); *cf.* Tex. Penal Code Ann. §§ 30.01, 30.02, 30.04 (1974).

[6] Notably, each of these statutes nonetheless lists "structure" and "vehicle" as two separate things, rather than referring to vehicles (or any subsets of vehicles) as types of structures. In particular, none of these statutes includes *any* type of vehicle in a list that ends with "or other structures." *See* Alaska Stat. § 11.81.900 (1984) (defining "building," for purposes of burglary statutes, as including, "*in addition to its usual meaning*, [] any

Accordingly, the plain, ordinary meaning of the term "building" as used by Congress in 1984—and as recognized by most states in 1984 and 1986—did *not* include mobile vehicles, regardless of whether adapted or used for overnight accommodation.

2. Although this Court held in *Taylor* that "the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building *or other structure*, with intent to commit a crime," 495 U.S. at 598 (emphasis added), that term should not—and cannot fairly—be read as bringing an entirely new category of crimes within the scope of burglary under the ACCA. The phrase "building or other structure" on its face suggests that an "other structure"

---

propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business" (emphasis added)); Del. Code tit. 11 § 222 (1973) (defining "building," for purposes of the criminal code, as including, "*in addition to its ordinary meaning*, [] any structure, vehicle or watercraft" (emphasis added)); Ky. Rev. Stat. § 511.010 (1980) (defining "building," for purposes of burglary statutes, to include "*in addition to its ordinary meaning*, [] any structure, vehicle, watercraft or aircraft: (a) [w]here any person lives; or (b) [w]here people assemble for purposes of business, government, education, religion, entertainment or public transportation" (emphasis added)); N.Y. Penal Law § 140.00 (1979) (defining "building," for purposes of burglary statutes, to include "*in addition to its ordinary meaning*, [] any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school" (emphasis added)); Utah Code Ann. § 76-6-201 (1973) (defining "building," for purposes of burglary statutes, as including "*in addition to its ordinary meaning*, [] any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business therein" (emphasis added)).

"must be similar in kind to" a building, *see Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 628 (2018) (discussing "effluent limitation or other limitation"). Because mobile vehicles with sleeping accommodations such as RVs and sailboats are decidedly *dissimilar* to buildings—regardless of the purpose for which they are used—the government's position is untenable.

It is also irreconcilable with this Court's conclusion in *Taylor* that the generic definition of ACCA burglary "is *practically identical* to the 1984 definition that, in 1986, was omitted from the enhancement provision," 495 U.S. at 598 (emphasis added)—namely, burglary of a building. This Court refused to "draw [an] inference" from Congress' omission of the 1984 definition of burglary in the 1986 version—noting, among other things, that "[t]he legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process." *Id.* at 589–590.

In encompassing mobile vehicles with sleeping accommodations—something decidedly dissimilar from buildings or other structures—the government's proposed definition of burglary would effectively "replace the 1984 'generic' definition of burglary with something entirely different," which is precisely what this Court sought to avoid in *Taylor*. *Id.* at 590. It is for this reason that this Court has repeatedly refused to expand the meaning of "structure" as used in *Taylor* to encompass movable objects such as vehicles.[7]

---

[7] *See Shepard v. United States*, 544 U.S. 13, 15–16 (2005) (distinguishing between an immobile "building or enclosed space" and a "boat or motor vehicle," and finding that burglary of only the former falls within the generic definition of burglary); *see*

II. THE GOVERNMENT'S POSITION THAT THERE WAS A "BROAD CONSENSUS" IN 1986 THAT BURGLARY COVERED TEMPORARY SPACES OR MOBILE VEHICLES ADAPTED OR USED FOR OVERNIGHT ACCOMMODATION IGNORES FUNDAMENTAL DIFFERENCES AMONG THE 1986 STATE STATUTES.

The government's assertion that there was a "broad consensus in 1986 that burglary included non-permanent or mobile structures adapted or used for overnight accommodation," U.S. Br. 19, is a gross overstatement that ignores fundamental—and, in some cases, irreconcilable—differences among the state statutes. A survey of the state burglary statutes in effect in 1986 shows that almost every state took a different approach to this issue, using definitions of burglary that varied not just among states but also across statutes within a single state, and even within a single statute. Far from reflecting a "broad consensus" about anything, the 1986 state burglary statutes reveal a thicket of distinctions, nuances, and inconsistencies from which the government's proposed redefinition of ACCA burglary could not—and cannot today—fairly be gleaned.

1. By the government's own count, only twenty-five states had burglary statutes in effect in 1986 that, as the government puts it, expressly "encompass[ed]

---

also, e.g., *Descamps v. United States*, 570 U.S. 254, 261 (2013) (noting that one portion of a statute prohibiting burglary of "a building" "corresponds to an element in generic burglary," and thus falls within the scope of ACCA burglary, "whereas the other [portion covering] an automobile[] does not"); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (differentiating between "breaking into a building," which would qualify as generic burglary, and breaking into a "vessel," which would not).

nonpermanent or mobile structures used for enumerated purposes." U.S. Br. App'x B at 21a.[8] And even as to those twenty-five, the "enumerated purposes" for which nonpermanent objects or mobile vehicles could be used varied tremendously among burglary statutes, often including purposes well beyond the specific one—overnight accommodation—that the government propounds here. For example, Arkansas's burglary statutes encompassed, *inter alia*, vehicles and other places in which "people assemble for purposes of business, government, education, religion, entertainment or public transportation." Ark. Stat. §§ 5-39-101, 5-39-201 (1975); *see also, e.g.*, N.Y. Penal Law § 140.00(2) (1979) (enumerated purposes for which structure or vehicle could be used for purposes of burglary statute included use "for overnight lodging of persons, . . . or carrying on business[,] . . . or elementary or secondary school").

2. Even among the "enumerated purposes" that arguably related to human habitation, there existed significant variations. Only thirteen states had burglary statutes using the phrase "overnight accommodation" to qualify use of a mobile or nonpermanent

---

[8] While the government relies on an additional nineteen statutes from 1986 to support the proposition that generic burglary included "permanent or non-mobile structures used or adapted for overnight accommodation," the government concedes that those statutes "encompass[ed] nonpermanent or mobile structures *irrespective of their purpose*." U.S. Br. App'x B at 21a (emphasis added). Accordingly, Congress could not have gleaned from those statutes a generic definition of burglary relating to a structure's specific purpose or use for "overnight accommodation."

space. And states interpret "overnight accommodation" differently. *Compare, e.g.*, *Blankenship v. State*, 780 S.W.2d 198, 210 (Tex. Crim. App. 1988) (en banc) (space was "adapted for overnight accommodation" despite the fact that it was being used only to store property, and the water and utilities had been turned off for years), *with Commonwealth v. Graham*, 9 A.3d 196, 197, 204 (Pa. 2010) (space was not adapted for overnight accommodation even where it had heat and running water). As the court in *Blankenship* emphasized, "[w]hat makes a structure 'suitable' or 'not suitable' for overnight accommodation is a complex, subjective factual question." 780 S.W.2d at 209.

Other statutes referred to uses such as, *inter alia*, "sleeping, living, or lodging," Ala. Code §§ 13A-7-1(2) (1983), 13A-7-5 (1979) (first-degree burglary of dwelling); "human habitation and occupancy," W. Va. Code § 61-3-11 (1973) ("[b]urglary; entry of dwelling or outhouse"); lodging "with a view to the protection of property," S.C. Code Ann. §§ 16-11-10 (1962), 16-11-311 (1985), 16-11-312 (1985) (first-degree and second-degree burglary involving "dwelling"); use as "a person's permanent or temporary home or place of lodging," Alaska Stat. §§ 11.81.900(17) (1984), 11.46.300(a)(1) (1978) (first-degree burglary involving dwelling); and use as "a dwelling place or place of human habitation," Va. Code Ann. § 18.2-90 (1975) (burglary statute covering certain mobile places).[9]

---

[9] The government's chart of state burglary statutes obscures critical differences among statutes even within a single state. For example, although the government's Appendix B cites Alabama statutes in effect in 1986 that covered burglary of "dwell-

The statutes varied further as to whether a place had to be "used" for the enumerated purpose, or whether it was sufficient that it was "adapted," "designed," or "intended" for that purpose, or even simply "suitable" for such purpose. *Compare, e.g.*, Ala. Code § 13A-7-1(2) (defining "building," for purposes of burglary statutes, as including vehicles "used for the lodging of persons"), *with, e.g.*, Alaska Stat. § 11.81.900(3) (defining "building," for purposes of burglary statutes, as including vehicles "adapted for overnight accommodation"), *and* Ga. Code Ann. § 16-7-1 (1980) (including within burglary statute mobile places "designed for use as the dwelling of another"), *and* Minn. Stat. § 609.581(2) (1983) (defining "building," for purposes of burglary statutes, as including structures "suitable for affording shelter for human beings"). And even among those statutes requiring active "use" of a vehicle or other place for an enumerated purpose, the requisite extent and frequency of that use varied. While some statutes did not specify the degree or frequency of use, others required that such locations be used "customarily" or "usually," or "for the time being." *Compare, e.g.*, Va. Code Ann. § 18.2-90 (1975) (including within burglary statute mobile places "used as a dwelling place or place of human habitation"), *with, e.g.*, Ark. Stat. § 5-39-101(1) (1975) (defining "occupiable structure," for purposes of burglary statutes, as

---

ing[s]" and "building[s]," it includes only the definition of "building"—"[a]ny structure which may be entered and utilized for business, public use, lodging, or the storage of goods, . . . includ[ing] any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein," Ala. Code. § 13A-7-1(2)—while omitting the definition of "dwelling," which was defined as "[a] building . . . used or normally used by a person for sleeping, living or lodging therein," *id.* § 13A-7-1(3).

including vehicles "customarily used for overnight accommodation"), *and* Haw. Rev. Stat. Ann. § 708-800 (1979) (defining "dwelling," for purposes of burglary statutes, as including mobile places "usually used by a person for lodging"), *and* N.D. Cent. Code Ann. § 12.1-05-12(2) (1973) (defining "dwelling," for purposes of burglary statutes, as including any "movable" structure vehicle that "is for the time being is a person's home or place of lodging").

Faced with these variations and distinctions, Congress could not reasonably have divined the principle proposed by the government: that vehicles "used or adapted for overnight accommodation" fall within the generic meaning of burglary.

III. The Addition of Temporary Spaces and Mobile Vehicles Adapted for Overnight Accommodation to the Generic Definition of Burglary Fails to Close the Purported "Gap" Between the ACCA and State-Law Definitions of Burglary, as Numerous State Burglary Statutes Would Remain Overbroad.

The government suggests that reading *Taylor*'s reference to "building or other structure" to include temporary spaces and mobile vehicles adapted for overnight accommodation would close an "untenable statutory gap in the [ACCA's] definition" of burglary. U.S. Br. 26. Not so. Many of the statutes to which the government points would not count as burglary under the government's own definition, because they (i) cover spaces or vehicles irrespective of their purpose, or (ii) extend to spaces or vehicles that have specified purposes beyond overnight accommodation.

1. The government does not question this Court's well-established use of the categorical approach to determining whether a prior conviction qualifies as an ACCA predicate offense. *See Mathis*, 136 S. Ct. at 2248; *Descamps v. United States*, 570 U.S. 254, 260–61 (2013). The first step in the analysis is to determine "whether the elements of the crime of conviction sufficiently match the elements of [the generic ACCA crime], while ignoring the particular facts of the case." *Mathis*, 136 S. Ct. at 2248.

If the elements of the state offense and "generic" federal offense listed as an ACCA predicate match, or "if the state statute defines the crime more narrowly," the state offense qualifies as an ACCA predicate. *Descamps*, 570 U.S. at 261; *see also Taylor*, 495 U.S. at 599. If, however, the state offense reaches more broadly, courts consider whether the statute is divisible. *See Descamps*, 570 U.S. at 261–62. To be divisible, a statute must set out elements—those findings upon which a jury must unanimously agree to convict—in the alternative. *See Mathis*, 136 S. Ct. at 2249; *Descamps*, 570 U.S. at 272. If the statute is divisible, the Court proceeds to the "modified categorical" approach, which authorizes consideration of a limited set of documents from the criminal record to "to determine which statutory phrase was the basis for the conviction." *Descamps*, 570 U.S. at 263 (internal quotation marks and citation omitted).

2. Even adopting the government's expanded reading of "building or other structure," the categorical approach reveals that numerous state burglary statutes would be too broad to qualify as burglary under the ACCA. While the government correctly notes that many states have "specifically delineated"—that

is, made some mention of—nonpermanent objects or mobile vehicles in their burglary statutes, U.S. Br. 18, a closer review of those statutes reveals that they extend to a variety of other uses beyond overnight accommodations. Unless a state burglary statute can accommodate a discrete jury finding that the defendant burglarized a vehicle *used for overnight accommodation*, as opposed to some other purpose, its continued overbreadth precludes its use as an ACCA predicate.

For example, many burglary statutes would remain overbroad because they include within their sweep vehicles and other places used for business purposes or storage. *See, e.g.*, Alaska Stat. Ann. §§ 11.46.310, 11.81.900(b)(5) (2018) (Alaska second-degree burglary, involving a "building," defined to include "any propelled vehicle or structure adapted for . . . carrying on business"); Colo. Rev. Stat. §§ 18-4-101, 18-4-202, 18-4-203 (2018) (Colorado first-degree and second-degree burglary, involving a "building or occupied structure," with "building" defined to include any "vehicle adapted . . . for carrying on of business therein" and "occupied structure" defined to include places "which, for particular purposes, may be used by . . . animals").[10] Other state burglary statutes would

---

[10] *See also* D.C. Code § 22-801(b) (2018) (District of Columbia second-degree burglary, which may involve any "vessel," "watercraft," or "yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade"); Iowa Code Ann. §§ 702.12, 713.1, 713.3, 713.5 (2018) (Iowa burglary offenses involving an "occupied structure," defined to include any "land, water or air vehicle . . . occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value"); *id.* § 713.6A (2017) (same);

remain overbroad because they include places used for public assembly and public transportation, such as city buses. *See, e.g.*, Ky. Rev. Stat. Ann. §§ 511.010(1), 511.020, 511.040 (2018) (Kentucky first-degree and third-degree burglary involving a "building," which includes any "vehicle, watercraft or aircraft" where "people assemble for purposes of business, government, education, religion, entertainment or public transportation"). Still others would remain overbroad because they cover vehicles and other places without limitation. *See, e.g.*, Idaho Code Ann. § 18-1401 (2018) (Idaho burglary extending to any "vehicle, trailer, airplane or railroad car").[11]

Mo. Ann Stat. §§ 569.010(2), 569.160, 569.170 (2018) (Missouri first-degree and second-degree burglary involving a "building or inhabitable structure," with "inhabitable structure" defined to include a "vehicle, vessel or structure . . . [w]here any person . . . carries on business or other calling"); Mont. Code Ann. §§ 45-2-101(47), 45-6-204 (2017) (Montana burglary and aggravated burglary involving an "occupied structure," defined to include any "building, vehicle, or other place suitable for . . . carrying on business"); N.H. Rev. Stat. Ann. § 635:1(I), (III) (2018) (New Hampshire burglary involving a "building or occupied structure," which includes any "vehicle, boat or place" adapted "for carrying on business therein"); N.D. Cent. Code Ann. §§ 12.1-22-02, 12.1-22-06(4) (2017) (North Dakota burglary involving a "building or occupied structure," which includes any vehicle "[w]here any person . . . carries on business or other calling"); Or. Rev. Stat. Ann. §§ 164.205(1), 164.215 (2018) (Oregon second-degree burglary involving a "building," defined to include vehicles, boats, and aircraft adapted "for carrying on business therein"); Utah Code Ann. §§ 76-6-201(1)(a), 76-6-202, 76-6-203 (2018) (Utah burglary and aggravated burglary, involving a "building," defined to include any "watercraft, aircraft, trailer or . . . vehicle adapted . . . for carrying on business").

11 *See also, e.g.*, Cal. Penal Code §§ 459, 460(b) (2018) (California second-degree burglary, extending to any "vehicle . . . when

For these reasons, a wide variety of state burglary statutes would remain overbroad, and thus disqualified as ACCA predicates, regardless of which party's interpretation is adopted. The government's purported attempt to bridge an "untenable gap in the statutory definition" of burglary, U.S. Br. 26, by expanding the definition, falls short.

IV. THE ACCA IS PROPERLY FOCUSED ON FORM, RATHER THAN FUNCTION, IN DELINEATING THOSE PLACES ENCOMPASSED BY GENERIC BURGLARY.

This Court has correctly looked to objective form, rather than subjective use, in determining whether certain spaces are encompassed by the ACCA's generic definition of "burglary." This bright-line rule affords consistency in applying the ACCA and makes practical sense. The government's expanded definition of "generic burglary"—which hinges on an object's actual or intended use—would engender confusion

---

the doors are locked"); Mich. Comp. Laws Ann. § 750.110 (2018) (Michigan burglary extending to any "boat, ship, shipping container, or railroad car"); Nev. Rev. Stat. Ann. § 205.060 (2017) (Nevada burglary extending to "any vehicle, trailer, semitrailer or house trailer"); N.J. Stat. Ann. §§ 2C:18-1, 2C:18-2 (2018) (New Jersey burglary involving a "structure," defined to include "any . . . ship, vessel, car, vehicle or airplane"); S.D. Codified Laws §§ 22-1-2(28)(c), 22-1-2(49), 22-32-1, 22-32-3 (2018) (South Dakota first-degree and second-degree burglary, involving an "occupied structure," defined to include any "motor vehicle, watercraft, aircraft, railroad car" "in which at the time any person is present"); *id.* §§ 22-1-2(49), 22-1-2(51), 22-32-8 (2018) (South Dakota third-degree burglary, defined to include any "unoccupied" "motor vehicle, watercraft, aircraft, railroad car"); Wyo. Stat. Ann. § 6-3-301(a) (2018) (Wyoming burglary extending to any "building, occupied structure or vehicle," without regard to the vehicle's use).

and almost certainly result in inconsistent application of the ACCA. It would also run afoul of the rule of lenity, which is particularly important in the context of the ACCA's mandatory fifteen-year sentence.

1. In clarifying the ACCA's scope in *Taylor*, the Court emphasized the distinction between buildings and structures, on the one hand, and vehicles or other mobile habitations on the other. Indeed, the Court expressly pointed to a Missouri statute criminalizing burglary of temporary spaces or mobile vehicles, including "any booth or tent, or any boat or vessel, or railroad car," as encompassing conduct beyond the ACCA's generic definition of "burglary." *Taylor*, 495 U.S. at 599. The *Taylor* Court also considered a range of Texas statutes that it identified as "includ[ing] theft from . . . [an] automobile." *Id.* at 591 (citing, *inter alia*, Tex. Penal Code §§ 30.01, 30.02, 30.04). One of the cited Texas "burglary" statutes was limited to burglaries occurring in a "habitation, or a building," with "habitation" defined as any "structure or vehicle that is adapted for the overnight accommodation of persons." Tex. Penal Code §§ 30.01, 30.02 (1974). Another "burglary" statute cited was entitled "burglary of vehicles." Tex. Penal Code § 30.04 (1974). The Court used these Texas statutes as support for its statement that burglary of automobiles—as opposed to entries of buildings or structures—falls outside the scope of ACCA burglary. *See Taylor*, 495 U.S. at 599.

Since *Taylor*, numerous courts—including this one—have looked to form, rather than intended or actual use, in determining whether entry of a place is burglary under the ACCA. In *Mathis*, 136 S. Ct. 2243, for instance, the Court considered an Iowa statute criminalizing burglary of an "occupied structure,"

which the Iowa Code defined as "any building, structure, . . . land, water, or air vehicle, *or similar place adapted for overnight accommodation of persons*," Iowa Code Ann. § 702.12 (1984) (emphasis added).[12] Although this language encompassed vehicles only if they were adapted for "overnight accommodation of persons," the Court held that the statute, "cover[ed] more conduct than generic burglary," because it "reache[d] a broader range of *places*." *Mathis*, 136 S. Ct. at 2250 (emphasis added).

Courts of Appeals have similarly applied a rule that focuses on "the nature of the property or place, not on the nature of its use at the time of the crime." *United States v. Rainer*, 616 F.3d 1212, 1214–15 (11th Cir. 2010) (holding that Alabama burglary statute which penalized entry into any "building," defined to include "any vehicle, aircraft or watercraft used for the lodging of persons," fell outside of the ACCA, and rejecting the argument that a clause limiting "buildings" to those used for lodging "narrow[ed] the burglary statute's sweep to generic burglary"). Thus, in overruling a line of cases finding that burglary of any

---

[12] The Iowa statute further defined "occupied structure" to include those "occupied by persons for the purpose of carrying on business or other activity . . . , or for the storage of safekeeping of anything of value." Iowa Code Ann. § 702.12 (1984). As discussed *supra*, this language would have rendered the statute overbroad under even the government's definition of generic burglary. But that was not the basis for this Court's holding that "the elements of Iowa's burglary law [were] broader than those of generic burglary." *Mathis*, 136 S. Ct. at 2257. Rather, this Court limited its analysis and holding to the locational elements of Iowa's statute—which rendered it overbroad—without any consideration of the functional components on which the government's position hinges.

habitable location was subject to the ACCA, the court in *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007), recognized that "*Taylor* jettisoned analyzing the *use* of an object in favor of analyzing the *nature* of the object when it adopted an express definition of burglary that is limited to the breaking and entering of buildings," *id.* at 851 n.5.

2. Limiting the definition of generic burglary by reference to the objective nature of a place makes practical sense. The government's expanded definition—with its newfound focus on a location's use—would create confusion and, almost certainly, produce conflicting decisions among lower courts.

Were the government's definition to prevail, a court applying the ACCA would need to (1) divine what the phrase "adapted or used for overnight accommodation" means—itself no small task, *see supra* Pt. II; and (2) determine whether the particular state statute at issue fit within that definition, *see supra* Pt. III. Given the variations in statutory definitions of use, *see supra* Pt. II—and the variations in how state courts interpret even the same exact terms and phrases, *see id.*—this analysis would almost certainly lead to varying and conflicting results among the lower courts. The government's definition thus threatens to create yet another "judicial morass" under the ACCA. *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015) (citation omitted).

3. The rule of lenity separately instructs that the current construction of the ACCA be retained. Under the rule of lenity, any ambiguity as to the scope of a criminal statute must be resolved in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 347

(1971). The rule applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *see also United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (noting that the rule of lenity could be applied to resolve ambiguity in the Sentencing Reform Act, to the extent it existed). Courts applying the ACCA are thus "guided by the rule of lenity," and will not interpret the ACCA "so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *United States v. Concha*, 233 F.3d 1249, 1256 (10th Cir. 2000) (citation omitted). As Justice Scalia explained, "[t]he rule of lenity, grounded in part on the need to give 'fair warning' of what is encompassed by a criminal statute . . . demands that we give this text [of the ACCA] the more narrow reading of which it is susceptible." *James v. United States*, 550 U.S. 192, 219 (2007) (Scalia, J., dissenting) (citation omitted), *majority op. overruled by Johnson*, 135 S. Ct. 2551.[13]

Broadening the ACCA's definition of "burglary" to include burglaries of temporary spaces and mobile vehicles used for some enumerated purpose, as the government proposes, would improperly sweep into the

---

[13] Although this Court refused, in *Taylor*, to apply the rule of lenity as a justification for adopting the common-law definition of burglary, the Court did so because it found the common law definition to be "implausible" and "at odds with the generally accepted contemporary meaning of [the] term ['burglary']." 495 U.S. at 596. Here, by contrast, a definition of generic burglary which excludes moveable vehicles from the meaning of "building or other structure" is eminently reasonable and consistent with the generally accepted meaning of the term "burglary."

statute a new category of criminal activity—without any indication that Congress intended to do so. Particularly where, as here, the statute at issue triggers a fifteen-year mandatory sentence, the rule of lenity should apply: citizens should not be left to "languish[] in prison" unless Congress "has clearly said they should." *Bass*, 404 U.S. at 348 (citation omitted). Congress did not do so here.

CONCLUSION

The judgments of the Court of Appeals for the Sixth Circuit and for the Eighth Circuit should be affirmed.

Respectfully submitted.

JEFFREY T. GREEN
Co-Chair, AMICUS CURIAE COMMITTEE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

DAVID DEBOLD
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
ddebold@gibsondunn.com

AKIVA SHAPIRO
SARAH L. KUSHNER
GENEVIEVE QUINN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

Counsel for Amicus Curiae

August 21, 2018